FOUR GERMAN JURISTS.

BRUNS, WINDSCHEID, JHERING, GNEIST.[1]

OF the jurists under whose personal influence it was my good fortune to be brought during my studies in Germany, four of the most distinguished have since passed away: Bruns in 1880, Windscheid and Jhering in 1892, and Gneist during the past summer. To each of these men I owe debts of the kind that cannot be repaid; and the impulse to describe,

[1] Karl Georg Bruns was born at Helmstedt, in Brunswick, February 24, 1816; studied law at Göttingen, Heidelberg and Tübingen; practised for a short time in Brunswick; began to teach at Tübingen in 1839; was advanced to the grade of extraordinary professor in 1844; accepted a call to Rostock as ordinary professor in 1849; went to Halle in 1851; to Tübingen again in 1859; to Berlin in 1861, where he remained until his death, December 10, 1880. His published works were: Das Recht des Besitzes im Mittelalter und in der Gegenwart (1848). Fontes iuris Romani antiqui (1860; 5th ed. by Mommsen, 1887). Das Wesen der bona fides bei der Ersitzung (1872). Die Besitzklagen des römischen und heutigen Rechts (1874). Die Unterschriften in römischen Rechtsurkunden (1876). Syrisch-Römisches Rechtsbuch aus dem 5ten Jahrhundert (1880). To Holtzendorff's Rechtsencyclopädie he contributed the important articles on the history of the Roman law and on modern Roman law. Two volumes of essays (Kleinere Schriften) were collected in 1882. A sketch of his life and work was published by Degenkolb in 1881.

Rudolf von Jhering was born at Aurich, in East Frisia, August 22, 1818; studied law at Heidelberg, Munich, Göttingen and Berlin; began to teach at Berlin in 1843; accepted calls, as ordinary professor, to Basel, 1845; Rostock, 1846; Kiel, 1849; Giessen, 1852; Vienna, 1868; Göttingen, 1872. Here he remained, declining calls to larger universities, until his death, September 17, 1892. He was ennobled by the Emperor of Austria. His published works were: Abhandlungen aus dem römischen Recht (1844). Civilrechtsfälle ohne Entscheidungen (1847; 6th ed., 1892). Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwickelung (4 vols., 1852–65; 4th and 5th eds., 1878–91). Das Schuldmoment im römischen Privatrecht (1867). Ueber den Grund des Besitzesschutzes (1868; 2d ed., 1869). Die Jurisprudenz des täglichen Lebens (1870; 9th ed., 1893). Der Kampf ums Recht (1872; 10th ed., 1891). Der Zweck im Recht (2 vols., 1877–83; 3d ed., 1893). Vermischte Schriften juristischen Inhalts (1879). Gesammelte Aufsätze (3 vols., 1881–86). Das Trinkgeld (1882; 3d ed., 1889). Scherz und Ernst in der Jurisprudenz (1885; 4th ed., 1892). Der Besitzwille: Zugleich eine Kritik der herrschenden juristischen Methode (1889). From his literary remains: Vorgeschichte der Indo-Europäer (1894). Entwickelungsgeschichte des römischen Rechts: Einleitung (1894). Sketches of his life and character by de Jonge (1888) and Merkel in *Jahrbücher für Dogmatik*, vol. 32 (1893).

however inadequately, their lives and labors springs partly from the feeling that a tribute to the memory of these great teachers from some one of their American pupils is a duty of scholastic piety. But I am also influenced by the conviction that such a description will be of interest and value to the readers of this review. The life-work of these scholars cannot be set forth on purely biographical lines : to study it involves a study of the movement of German jurisprudence in the nineteenth century. To understand their efforts it is necessary to consider the scientific environment in which they grew up,

Bernhard Josef Hubert Windscheid was born at Düsseldorf, June 26, 1817; studied law at Bonn and Berlin; was employed in the judicial service 1837–40; began to teach at Bonn in 1840; was appointed extraordinary professor in 1847; accepted a call to Basel the same year as ordinary professor; went to Greifswald in 1852; to Munich in 1857; to Heidelberg in 1871; to Leipzig in 1874. Further calls to Strasburg, Vienna and Berlin were declined. From 1874 to 1883 he was a member of the commission appointed by the German Federal Council to draft a civil code for the Empire. He died October 26, 1892. His publications were: Die Lehre des römischen Rechts von der Voraussetzung (1850). Die Actio des römischen Civilrechts (1856). Lehrbuch des Pandektenrechts (3 vols., 1862–67; 6th ed., 1887). Wille und Willenserklärung (1878). Zwei Fragen aus der Lehre der Verpflichtung wegen ungerechtfertigter Bereicherung (1878).

Rudolf von Gneist was born at Berlin, August 13, 1816; studied law at Berlin; entered the Prussian judicial service and was advanced, in 1841, to the position of assistant judge; resigned, on political grounds, in 1850; was appointed, in 1875, a member of the superior administrative court (Oberverwaltungsgericht) of Prussia. — In 1848 and 1849 he was a member of the city council of Berlin; in 1858 he was elected to the Prussian Diet, and was reëlected with unfailing regularity until his withdrawal, a few years ago, from active political life. From 1867 to 1884 he was a member of the Imperial Diet also. In 1883 he was appointed a member of the Prussian Council of State. He was ennobled by the Emperor Frederick III. — His academic career began, at Berlin, in 1839; he was appointed extraordinary professor in 1844; ordinary professor in 1858; and retained this position until his death, July 22, 1895. Among his more important publications were: Die formellen Verträge des neuern römischen Obligationenrechts (1845). Adel und Ritterschaft in England (1853). Das heutige englische Verfassungs- und Verwaltungsrecht (1857–63; 3d ed. of Part I under the title Das englische Verwaltungsrecht der Gegenwart, 2 vols., 1883–84; 3d ed. of Part II under the title Selfgovernment, Kommunalverfassung und Verwaltungsgerichte in England, 1871). Verwaltung, Justiz, Rechtsweg, Staatsverwaltung und Selbstverwaltung nach englischen und deutschen Verhältnissen (1869). Die preussische Kreisordnung (1870). Der Rechtsstaat (1872; 2d ed., 1879); Gesetz und Budget (Berlin, 1879); Englische Verfassungsgeschichte (Berlin, 1882); Das englische Parlament (Berlin, 1886). — Monograph by Walcker, in Hinrichsen's Deutsche Denker (Berlin, 1888); article by Bornhak, *Archiv für öffentliches Recht*, xi, 2 (1895).

the points of view which they inherited and retained or abandoned, the tendencies which they continued or opposed. To appreciate their influence it is equally necessary to consider the extent to which they furthered the development of their science upon lines already marked out, and the degree in which, by opening new lines of thought and study, they nave given to its further progress new impulses and different aims. The problems which have engaged the attention of German jurists during this century are, in large degree, universal problems; and the solutions which they have reached should be of interest to all who care for legal science.

I.

The present period of German jurisprudence begins, as far as any historical period can be said to have a distinct beginning, with Savigny,[1] whose treatise on the *Law of Possession* made him famous a dozen years before Bruns (the eldest of our four) was born, and who closed his career as a teacher just as Bruns, Gneist and Windscheid were beginning theirs. Savigny was the founder of the historical school which is still dominant in modern legal science. Against the conception of "natural" law, universal in its dominion, eternal and unchangeable in its essence, progressive only in the sense that a fuller recognition and more perfect comprehension of its principles may be progressively attained, Savigny set up the conception of law as an historical product of the life of each people or nation, varying according to the national genius, developing in each nation with that nation's entire social development. A large portion of his life was devoted to studying the history of the Roman law, in both the ancient and the mediæval world. The great monument of these investigations is his *History of the Roman Law in the Middle Ages.*

In addition to these historical studies, however, Savigny carried on throughout his life, with rare acuteness of analysis, the labor of resolving the traditional institutions of law into

[1] Born 1779; died 1861.

their ultimate juristic elements. With this he combined, and with no little success, the effort to reformulate and refine the synthetic conceptions with which legal science operates. Of these labors in systematic jurisprudence the chief results were incorporated in his unfinished *System of Modern Roman Law.*

An important impulse to the historical investigation of the Roman law had already been given, toward the close of the sixteenth century, by the French jurist Cujacius; and a serious attempt to establish a more logical and coherent system of Roman law had been made about the same time by his countryman Donellus. But the historical impulse was checked in the seventeenth and eighteenth centuries by the predominance of natural-law theories; and in the systematic field the work of the great Dutch jurists on whom the mantle of Donellus fell was more and more directed to the new science of international law. In Germany, still absorbed in the practical labor of assimilating the "foreign laws," civil and canon, and fitting them to its own social conditions, neither Cujacius nor Donellus had found any important following. In this country the new impulses given by Savigny were especially needed, and the seeds sown by him have brought forth an abundant harvest, not in Germany only, but throughout the civilized world.

II.

Every effective human impulse, however, is one-sided and provokes a more or less legitimate reaction. Insistence upon one portion of the truth tends to obscure other portions, and these find new exponents and defenders. It was asserted, and not without reason, that Savigny and his immediate followers regarded the evolution of law as an organic social process upon which the individual reason and the individual will have little influence; that they ignored, or at least underrated, the conscious and reflective element in legal development; and they were accused, not without justice, of "quietism" or fatalism. If legal changes, whether made by custom or by legislation, are, as Savigny maintained, merely the expression of slowly

ripening popular instincts, then such changes are sure to come when these instincts are sufficiently ripened. To hasten the process may be impossible; it will certainly result in mistakes. Such was, in fact, the feeling of Savigny, who was politically an extreme conservative;[1] and the attitude of his immediate followers toward reformatory legislation was far from sympathetic. It was also asserted, and again with reason, that the historical jurists insisted too much upon the national character of law and ignored its human character. After all, Greeks, Romans and Teutons were, in the first place, men with human feelings, ideas and tendencies; in all the systems of law that have existed or now exist, there is much that is common, and the common element is the most significant. These points of antagonism, or rather these supplementary considerations, gave birth to the so-called philosophical school or, as Thibaut, its leading representative, preferred to call it, the "philosophical-historical" school. A characteristic controversy[2] between Thibaut and Savigny, in which the former advocated and the latter opposed the construction of a civil code for all Germany, brought out most clearly their different attitudes towards legislation. The attempt of Gans, another leader of the philosophical school, to trace the law of inheritance in its "world-historic development,"[3] marked with equal clearness the reaction against the purely national point of view.

What is the attitude of German jurists to-day toward these controversies? What, in particular, was the attitude of the jurists who form the subject of our present study? As regards the emphasis laid by the philosophical school upon the human and universal character of law, at least in its fundamental conceptions, Bruns has well said that this led to the development of a purer legal philosophy,

[1] Compare with the conservatism of Savigny, the historical jurist, that of Burke, who regarded politics preëminently from the historical point of view.

[2] Thibaut, Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland. Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft. Both pamphlets appeared in 1814.

[3] Gans, Römisches Erbrecht in weltgeschichtlicher Entwickelung (4 vols., 1824–1835).

which no longer regards as its task the discovery of an absolute law of nature, but only seeks to recognize, in their universality and necessity, the general conceptions and ideas which attain concrete historical manifestation in the single national systems of law.[1]

He might have added that the philosophical school furnished the theoretical basis for the new comparative science of law, which is still to-day in the earlier stages of a most promising development.

Jhering, who in the first book of his *Spirit of Roman Law* made brilliant use of the comparative method, condemns, in his introduction to that work, the narrow national view taken by the historical school. "Legal science," he says, "is brought down to the plane of territorial jurisprudence. The scientific boundaries coincide in jurisprudence with the political."[2] After emphasizing the interdependence of nations, and pointing out that the legal development of the modern world, or at least of the modern European world, has been substantially a general and not a national movement, he writes:

> And however brief, from the point of view of the ages, is the fragment of history thus far unfolded in this new legal epoch, is it not already clear that it is the thought of universality that gives its character and furnishes the key to the present era? It was with a correct instinct for this trend and drift of modern law that the natural-law school proclaimed its doctrine of the universality of law, elevated above time and place. However little scientific value I may attribute to the works produced in this field, the *direction* which the natural-law theorists pursued was as decidedly in line with the peculiar course of modern history as that of the historical jurists, with their one-sided insistence upon the principle of nationality, was divergent from it. The law of nature, far from standing outside of time and ignoring actual conditions, was in fact but an idealization of existing conditions.[3]

Gneist also declares, in one of his later monographs, that a further development of legal science can be attained only by

[1] Bruns, Das heutige römische Recht, in Holtzendorff's Rechtsencyclopädie, 3d ed. (1877), p. 336.

[2] Jhering, Geist des römischen Rechts (3d ed., 1873), vol. i, p. 15.

[3] *Ibid.*, p. 11.

taking up again the natural-law doctrines of the past, and giving them further development.[1] The monograph itself is an interesting attempt to sketch in broad lines the development of human law in general, and of modern European law in particular.

These utterances of men who regarded themselves as followers of Savigny sufficiently indicate that, on this point at least, the antithesis of the historical and philosophical schools has disappeared. It is fully recognized that each was right in its main contention.[2]

As regards the attitude of the two schools towards legislative reform, it is sufficient to point out that there is to-day no diversity of opinion among German jurists regarding the desirability of a German code; although, as was pointed out in a previous article of mine in this review,[3] the question to-day is not of the superiority of legislation over usage, of written over unwritten law, but the preference of general federal law to divergent state laws. It may be added that nearly all modern German jurists agree with Savigny that Germany was not ready for codification in 1814.

III.

Of less interest to science at large than the philosophical reaction, but of more practical consequence to Germany, was the "national" opposition. Savigny and his disciples were attacked by the nationalists not as historical jurists — for the armory of historical jurisprudence furnished the assailants with their best weapons — but as "Romanists," as champions of the Roman law and advocates of its continued supremacy in

[1] "Dies Vorwärtsschreiten [der Wissenschaft] wird nur in der Wiederanknüpfung an die naturrechtlichen Lehren der Vergangenheit liegen können, und in der Weiterführung derselben." Zur Lehre vom Volksrecht, Gewohnheitsrecht und Juristenrecht, in Festgabe für Beseler (1885).

[2] So Windscheid, also, in his lectures on Pandects, in 1878: "The correctness of both views is now fully recognized. The antithesis was long ago surmounted."

[3] State Statute and Common Law. POLITICAL SCIENCE QUARTERLY, vol. iii, pp. 155–160 (March, 1888).

Germany. The attack came from the "Germanists," the defenders of Teutonic ideas and institutions.

In the sixteenth century, at the period of the completed reception of the Justinianean codes, and for some two centuries afterwards, there were no Germanists in Germany — at least among the jurists. The only protests against the overwhelming triumph of the Roman law, and against the partial destruction of German legal institutions, came from laymen — knights and peasants. The jurists had all been trained in the Roman law, first in Italy and later in the German universities. They were carried away by its cosmopolitan breadth of spirit, its logical symmetry, and above all, by the fact that it furnished ready solution for all the new problems with which German folk-law was clumsily wrestling. To them the native Germanic customs were barbarous and irrational, things in which no intelligent man could take an interest. To their attitude was due not the fact of the "reception,"[1] but its completeness. In

[1] The prime cause of the reception, not in Germany alone, but throughout Europe, was the change in economic conditions which followed the revival of commerce in the eleventh and twelfth centuries. Social life became more complex, and the simple customs by which the greater part of Europe was governed became inadequate. One of the first results of the commercial revival was the extension of the mercantile law of the Eastern Mediterranean, which was largely Roman or Græco-Roman in its structure, over the new highways of trade — along the coasts of the West Atlantic and of the North and Baltic Seas, and along the great land routes between these seas and the Mediterranean. (*Cf.* Goldschmidt, System des Handelsrechts, vol. i.) This body of law, however, was applicable only to traders and to distinctly mercantile transactions. For the rest of the people new law was needed, and the law-books of Justinian amply met the need. Where the Roman law was theoretically in force already (*e.g.*, in South France) such rude compilations as the Breviary of Alaric were supplanted by the Corpus Iuris Civilis. In other parts of Europe a true "reception" of the Roman law occurred. In those countries which were not at first touched by the revival of trade, and where simple economic conditions continued to prevail (*e.g.*, in the old cantons of the Swiss Confederacy), the Roman law was not received.

A negative condition of the reception was the inability of the mediæval state to furnish the new law that was needed. Feudalism had so disintegrated political authority that in most parts of Europe there were no organs for the development of national law, whether by legislation or by decisions on appeal. Recourse was therefore had to the older laws of the Roman Empire. Their application was facilitated (not caused) by the general belief that all authority in Europe was ultimately derived from the Roman Empire, and that the Roman Emperors, from Augustus down, were the predecessors of all mediæval rulers. Where this condi-

theory, the Roman law was received as subsidiary law, to be applied only when the local law furnished no rule. But the jurists recognized German law only in the form of local custom, and insisted that every such custom was a fact to be pleaded and proved by the party who desired its application. When it is remembered that questions of fact, as well as questions of law, were decided by the learned judges, themselves doctors of the civil law, the effect of the procedural rule just stated can easily be imagined. In all parts of Germany the German law was more or less submerged and lost ; more in the South and West, less in the North and North-East.[1]

Not a few Teutonic ideas and institutions, however, were preserved by putting them, so to speak, into togas and teaching them to talk Latin. They found shelter and recognition in the so-called *novus usus pandectarum*, a collective designation of the changes wrought in the Roman civil law by mediæval practice. Some of these disguised natives of Ger-

tion of political disintegration did not exist, neither economic changes nor the fiction of "continuous empire" was strong enough to secure the reception of the Roman law. In England, where the Norman conquest had so solidified the state that the King in Parliament could enact statutes for the realm, and the King's courts could develop the *lex terrae* by their decisions, the new law required was worked out on the basis of existing Anglo-Norman customs. In Spain, where the struggles with the Moors had strengthened royal authority, the reception of the Justinianean law-books was averted by the publication of a Spanish code, largely influenced by Roman ideas, but still an independent and national system of law. In North France, where in the fourteenth century the royal power was so far increased that procedure could be reformed by royal ordinances, and appeals carried to the King's courts, the Roman law was not received as law but was invoked simply as *ratio scripta* when the customs were silent. Here, as in England, the basis of the legal development remained Teutonic.

In Germany and in the Netherlands the "practical," as distinguished from the "scientific" or theoretical reception of Roman law, was generally synchronous with the appearance of the "learned judiciary," *i.e.*, with the substitution of governmental justice administered by professional lawyers for popular justice administered by lay judges. The conviction that Roman law was applicable and authoritative, and the attempt to apply it, of course hastened this change, and the control of the courts by men trained in the civil law was the decisive element in the practical reception.

[1] In the Saxon lands much of the Teutonic custom was preserved through a private compilation which obtained great authority, the Sachsenspiegel. A somewhat similar compilation existed in South Germany, the Schwabenspiegel.

many crossed the Alps in the very van of the Roman invasion. They had already received Roman citizenship in the Italian courts. Still others came over in sacerdotal vestments. They had been naturalized at an even earlier period in Rome itself, and figured as canons of Holy Church.[1] After the reception of the foreign laws, and largely in consequence of a popular reaction against them, still other fragments of Teutonic law were preserved in official compilations of "statutes" or local rules of law.

That any community of origin existed between those rules of German law which had found shelter in the canon law, or in the new usage of the *Pandects*, and which were, therefore, common law, and those other rules which had survived the reception as local customs or statutes, was not generally understood until the present century. Not until the eighteenth century were even the various local customs recognized as fragments of an earlier whole.[2] It was through the labors of Carl Friedrich Eichhorn,[3] a contemporary and friend of Savigny, that German law was raised to the rank of an independent juristic discipline. For many years now the Germanists have occupied in every university a position fully coördinate with that of the Romanists or Pandectists, and an acquaintance with the history and institutes of German law is as necessary

[1] In Germany, as in Italy, the canon law overrode the civil when the two came in conflict.

[2] In 1643 one Herman Conring, a physician, published a treatise, De Origine Iuris Germanici, in which the results of later historical investigation were largely anticipated. Curiously enough the treatise was called forth by a current theological controversy. The jurists paid no attention to Conring's work. In the eighteenth century the common origin of the various local customs was discovered by members of the legal profession, and lectures on German law began to be delivered in the universities. This innovation was at first regarded with little favor. The Prussian Chancellor Cocceji, having been charged by Frederick William I with the preparation of a general civil code, submitted for the King's approval, in 1738, a preliminary report concerning the scope and plan of the proposed codification. In this report the chancellor went out of his way to express his contempt for that "imaginary German law which sundry tutors (Privat-Doctores) have taken the liberty to invent." His code was to be based on natural reason. When drafted it turned out to be substantially Roman.

[3] Born 1781; died 1854. His great work was his Deutsche Staats- und Rechtsgeschichte (1808; 5th ed., 1842–44).

for university degrees and bar examinations as is a knowledge of the Roman law.[1]

Between the leaders of the two schools, the Romanistic and the Germanistic, there was no controversy. Savigny himself, in pleading against immediate codification, had insisted that the different elements of which the existing law of Germany was composed were still imperfectly comprehended, and had urged a thorough historical study of Roman and of German law; and Savigny and Eichhorn coöperated in establishing the *Zeitschrift für geschichtliche Rechtswissenschaft*, which from the outset gave impartial shelter to the fruits of investigation in both fields. But the younger Germanists, with the heat that naturally resulted from their struggle for academic equality, opened an attack upon the Roman law. They disputed the rightfulness of its supremacy. They denied that it had any legitimate place in Germany. Savigny's theory of the national character of law gave them an admirable opening. He had declared, in the introductory article of the first number of the *Zeitschrift*, that the law of a nation was the product "of its innermost nature and its history." "If this be true," said the Germanists, "what justification was there for the reception of the Roman law in the fifteenth and sixteenth centuries? What justification is there for its continued supremacy? Ought it not to be thrust out as an illegitimate interloper, and should not the teachers of the historical school be the first to demand its exile?" Savigny, of course, had an answer. In the evolution of every national law there comes a period when it ceases to be the direct and immediate product of the national consciousness. Its further development falls into the hands of a class, the lawyers, and ultimately into the hands of legislators. At the time of the reception the jurists represented the German people, and their reception of Roman law made it German law. To this the Germanists responded that the legal profession might,

[1] At least, in theory. Practically, the time devoted by the German law-students to Roman law is at least thrice that given to the German law, and the relative stress laid upon these subjects in the examinations is roughly in the same proportion.

indeed, represent a nation, as was the case in the development of the ancient Roman law, but that the German jurists of the fifteenth and sixteenth centuries had divested themselves of all national feeling and were no true representatives of Germany.

The national agitation against the Roman law reached its highest point in the forties.[1] The events of 1848 raised new questions, political rather than juristic in character, and the discussion between the Romanists and the Germanists terminated in apparent agreement. It was generally admitted by the Romanists that the way in which the Roman law had been received was unfortunate; that the overturning of established German customs was indefensible. It was conceded by the Germanists, on the other hand, that the reception of the Roman law was not on the whole a misfortune; that the appropriation of this portion of the vast inheritance of the ancient world had greatly enriched modern European civilization.

Jhering justifies the reception of the Roman law in Germany on the broad ground that no nation can attain the highest civilization save by participation in the civilization of the world.

> The life of nations is no isolated existence side by side, but, like that of individuals in the state, a common life; a system of reciprocal contact and influence, peaceful and hostile; a giving and taking, borrowing and bestowing; in short, a vast business of exchange that embraces every side of human existence. The same law that governs the physical world exists for the spiritual: life is reception from without and internal assimilation: these are the two basic functions on whose maintenance and balance rest the existence and health of every living organism. To prevent reception from without and condemn the organism to development "from within outwards," is to kill it. That sort of development begins with the corpse.[2]

[1] Among the more important contributions to the controversy, on the Germanistic side, were: Kjerulff, Theorie des gemeinen Civilrechts (1839); Bluntschli, Die neuern Rechtschulen der deutschen Juristen (1841); Beseler, Volksrecht und Juristenrecht (1843).

[2] Geist des römischen Rechts, 3d ed., vol. i, pp. 5, 6.

This vast system of exchange has always included spiritual as well as material goods; and it is from this point of view that he condemns the national standpoint of the historical jurists.

> In the ship that brought wares, gods went back. . . . Language, morals, religion, words, ideas, prejudices, faith, superstitions, industry, art, science, — all follow the rule of international communication and influence. And law? Does that alone stand outside of this universal rule of civilization? That is the outcome of the doctrine we are combating, and which we must combat if we are to find a place for the Roman law, — the doctrine of the historical school that law develops purely from within each nation. We are not to introduce juries, because they did not spring up on our native soil; the constitutional form of government is of foreign growth, and therefore to be condemned. . . . The question of the reception of foreign legal institutions is not a question of nationality, but simply one of expediency, of need. No one will fetch a thing from abroad when he has as good or better at home; but only a fool will reject the bark of the cinchona because it did not grow in his vegetable garden.[1]

A warning example of the results of national isolation is afforded by China, "the Don Quixote of the principle of nationality."

The special justification of the reception of the Roman law in mediæval Europe Jhering finds in the supra-national, universal character which the Roman law had already assumed in the first centuries of the Christian era, and in the similar character which its reception has given to modern European law. In this, as in other matters, Rome furnishes the point of communication between the ancient and the modern world; and here, as always, Rome stands for the principle of universality as against that of nationality. No one who has read the *Spirit of the Roman Law* can forget the striking sentences with which the book opens.

> Thrice has Rome dictated laws to the world, thrice bound the nations together in unity: the first time, while the Roman people still stood in the fullness of its power, in the unity of the state; the

[1] Geist des römischen Rechts, 3d ed., vol. i, pp. 8, 9.

second time, when that people had already perished, in the unity of the church; the third time, in consequence of the reception of the Roman law in the middle ages, in the unity of law; the first time by external coercion, by force of arms; the second and third times by force of intellect.

Windscheid goes a step further towards the Germanists. He remarks that Jhering's theories of international exchange and of the supra-national element in law, particularly in the Roman law, are "certainly true. But it does not follow that the peculiar genius of each nation should not in last instance determine whether any thing is or is not properly *its* law." [1]

Bruns also emphasizes the universal side of the Roman law, and seeks to define it.

The significance of the Roman law in the history of the world lies chiefly in the fact that in it was developed the abstract conception of the personal right (*des subjektiven Rechts*), and especially the general and equal attribution to individuals of private-law rights. Herein lies what is called the universal character of the Roman law. This does not mean that the Roman law is eternal and absolute law for all nations and times, or that it alone can satisfy the needs of any modern nation, but that in it an essential and general element of law, which must find place in (and, in a sense, form the basis of) every system of law, was worked out in so complete a way as to furnish all nations and times with a model of theoretical and practical value.[2]

He emphasizes, as does Jhering,[3] the new touch of universality which the Roman law gained by its reception in the middle ages.

We must guard ourselves carefully against the notion that what is called modern Roman law is simply that part of the Roman law that is still in force to-day. In modern Roman law are embodied the labor, intellectual development and science of all modern Europe. Modern Roman law is by no means the actual law of Rome. Its substance from beginning to end is permeated with modern ideas.

[1] Windscheid, Pandekten, § 10, note 4.

[2] Bruns, Geschichte des römischen Rechts, in Holtzendorff's Rechtsencyclopädie, 3d ed., p. 81.

[3] Geist des römischen Rechts, vol. i, pp. 10, 11.

Its entire form is, in even higher degree, an essentially modern creation of the modern mind, in which nearly all nations have participated.[1]

As to the practical inferences, also, to be drawn from these considerations the jurists have reached substantial agreement. That which is really universal in the Roman law is to be retained and developed; that which is based upon conditions peculiar to the ancient world, or upon ideas of justice and expediency that were specifically Roman, is to be rejected. Jhering puts all this in a single phrase which has become famous: "Through the Roman law, but beyond and above it."[2]

With these declarations of the Romanists the Germanists seemed satisfied. Their own utterances were not dissimilar. But the apparent agreement was largely due to the acceptance of a common formula which each party could interpret and apply as it saw fit. How much of the ancient Roman law was really universal and how much temporary and national? How far did the practice of the mediæval Italian and German courts eliminate the antiquated and foreign elements? How far had institutions originally foreign to German instincts become German by adoption? These are questions upon which differences of opinion are perfectly natural; and given an academic system under which a large number of jurists devote their entire time to studying and teaching the Roman law, while another considerable body is wholly immersed in early Teutonic customs and recent German legislation, such differences were certain. But for forty years Germanists and Romanists lived together in peace, or armed neutrality; taught as they thought, and left it to the students to reconcile or choose between their opposite opinions. The publication of the Imperial draft code in 1888 opened the sluice-gates of the academic reservoirs, and in the flood[3] of controversial literature that at once burst forth, the degree of divergence between

[1] Bruns, Das heutige römische Recht, in Holtzendorff, p. 334.

[2] "Durch das römische Recht, aber über dasselbe hinaus." Geist des römischen Rechts, vol. i, p. 14.

[3] A catalogue of this literature, published by Puttkammer and Mühlbrecht in 1892, contains some six hundred titles.

Romanistic and Germanistic opinions is strikingly disclosed. Not a few of the Romanists are disturbed by the number of uncouth Gothic details that figure in the plans of this new temple of justice, and have hastened to plead for a stricter adherence to classical lines. But their mild protests are drowned in the cries of wrath that issue from the Germanistic camp. "Doctrinaire devotion to scholastic concepts," "contempt for German law and for the popular consciousness of right," — these phrases will serve, without further extracts, to show what passions have been slumbering through the forty years' truce.

But this revival of the old controversy runs beyond the limits of our present theme, for our four jurists took no part in it. Bruns was already dead; Windscheid was restrained from entering into any discussion of the code by the fact that he had been one of the commission of codification; Gneist had long devoted himself entirely to public law and stood aloof from purely private-law controversies. Jhering indeed published a criticism of the code,[1] but his objections had little to do with the national controversy.

IV.

The attempt to codify the private law of the empire has given practical importance to-day to the disputes of the Germanists and the Romanists; the codifiers have been obliged to choose or compromise in numberless cases between opposed views of legal relations; but it may well seem as if the controversy that raged fifty years ago, when no general codification was in sight, was purely academic. This was not the case. The Germanists had a practical grievance against Savigny and his school. The historical researches prosecuted by the latter had clearly shown that the Roman law, as applied by the German courts, was in many respects a different thing from the Roman law of the *Digest*. Starting with the theses that it was Roman law that had been received and that the authentic

[1] Besitzwille, pp. 470–534.

exposition of the Roman law was to be found in the law-books of Justinian, Savigny and his followers were disposed to treat the modifications introduced by mediæval practice as aberrations, and the influence of the school was thrown in favor of a reversion to the law of the *Digest*. Their arguments actually changed[1] in many respects the practice of the German courts in the common-law territories, *i.e*, in those parts of Germany where the Roman law had not been superseded by modern codes. Savigny and his disciples were therefore accused of having added a fresh injury to the original wrong of the reception by completing the reception.

Here again, since 1848, the Romanists have, to some extent, seen the error of their ways and drawn nearer to the Germanists. Mediæval modifications of the Roman law are no longer dismissed as mistakes due to ignorance. It is recognized that, in many instances, they represent the further development of progressive tendencies revealed in the later Roman jurisprudence and legislation; in other instances, the adaptation of the Roman law to different social and economic conditions; and, in many cases, the acceptance of legitimate or at least defensible Teutonic points of view. The change in the

[1] This partial revolution of judicial practice was made possible by the attitude of continental European theory towards judicial practice. The German jurists, like the French, almost uniformly deny that decisions make law. In view of the historical facts their attitude seems inexplicable. They teach that the Roman law was largely developed by "interpretation"; that old German law was developing along the same lines when its growth was arrested, first by feudal disintegration of judicial authority and then by the reception of the foreign laws; that the practical reception of the Justinianean law was accomplished through its acceptance by the "learned judiciary"; that the Roman law was received as modified by Italian practice, and that it was subjected to further modifications in the German practice, — and yet they do not concede that judicial custom, as such, is law They go no further than to admit that the practice of the courts may in some mysterious way be transmuted into customary law — or rather, that it might be and perhaps was so transmuted in the middle ages, although the process is no longer possible to-day. The leading Germanist of the present day, Brunner, sees and expresses this point clearly. He writes: "Romanistic theory and practice are still in large degree unable to grasp the indubitable truth that the results of the practical reception, even where they rest upon a misunderstanding of the sources of the Roman law, exclude the application of pure Roman law." — Quellen und Geschichte des römischen Rechts, in Holtzendorff (5th ed., 1890) p. 293.

Romanistic attitude was, in no slight degree, the work of Bruns. He was one of the first to make a serious study of mediæval theory and practice in a special field.[1] He selected that field in which Savigny had begun his crusade for pure Roman law — possession. Bruns's *Law of Possession in the Middle Ages and the Present Time*, published in 1848, was not merely a finished presentation of the results of careful research and an important contribution to legal history : it was an explanation and, in some degree, a justification of the changes introduced by the mediæval jurists. Bruns himself, in this as in his subseqent writings on possession, remained, in principle, an adherent of the Roman theory as reformulated by Savigny, —the theory that finds the characteristic element of juristic possession in the intention (*animus*) of the possessor, — and he exhibited little sympathy for such changes in the law as seemed to him irreconcilable with this theory. The same may be said of Windscheid.[2] Jhering, however, in his last important work, *Possessory Intention*, not only gives a sweeping endorsement to nearly all the changes introduced by mediæval courts and modern legislators, but carries his assault upon the Romanistic doctrine back of Savigny. He finds the first false step, to which all subsequent aberrations are due, in a bad reason given by Paulus for a correct statement of positive law.[3]

Another valuable bit of research in mediæval legal history is Bruns's study of the presumption of death in case of disappearance, in which he shows how German custom, modified by a verse from the *Psalms* and a dictum from the *Digest* regarding usufruct, produced the rules which have found their way into the principal modern codes.[4] The chief importance of these investigations, and of other similar studies to which they furnished an incentive, lies in the fact that mediæval legal development was no longer treated with contempt, but was taken seriously and examined critically.

[1] Savigny's History of the Roman Law in the Middle Ages is rather a history of the civil law as an entirety, with especial reference to its literary treatment, than a study of the development of single legal institutions.

[2] Pandekten, § 162.

[3] Besitzwille, pp. 269–300 ; 457 *et seq.*

[4] *Jahrbuch des gemeinen Rechts*, vol. i, p. 5 (1857).

V.

We have thus far confined our attention to the controversies aroused by Savigny's historical theory and by the work of the historical school in the Romanistic field. We have now to note the results of the impulse which he gave in the domain of systematic jurisprudence. Briefly stated, these results were, in the first place, a tendency to excessive generalization, a gradual and unconscious transfer of juristic labor from the field of legal science proper to that of legal philosophy; and then a reaction towards a more practical jurisprudence. Jhering was the leader of this reaction.

The power of generalization which the Germans possess in so high a degree is perhaps the chief factor in their scientific triumphs. Patient research furnishes the material with which science deals, but to make anything of this material it is necessary to discover the principles which underlie and explain — or at least serve to correlate — the facts. But every marked power carries with it the risk of abuse. Not only does the love of generalization easily lead to useless abstraction; it is attended by other and more serious perils. There is the danger of forgetting that the so-called principles of a science are really working hypotheses; that they have been obtained by induction and are to be tested in their application. There is the impulse to wrest evidence to their support and to ignore or evade such facts as prove intractable. There is even, with minds of a certain sort, a tendency to ascribe to accepted principles a character of finality — a truth superior to the apparent truth of mere facts. The more abstract the generalizations, the greater is the harm which such tendencies may entail.

Savigny's own systematic work was not wholly free from these faults, but in his case they were checked by a strong sense of the practical. He was fundamentally more lawyer than philosopher. Among his followers, however, some of whom were obviously intended by nature for philosophers rather than for lawyers, the tendency to excessive abstraction

and to undue valuation of its results ran riot. Puchta[1] in particular, the leading Romanist of the middle period between Savigny and the contemporaries of Jhering, carried idealistic jurisprudence to a point not before attained and hardly exceeded since. To Jhering, in the earlier period of his revolt, Puchta seemed the incarnation of the tendencies against which he had declared war. At a later period he carried the attack further back and directed it against Savigny, and ultimately, as we have seen, against Paulus. Even then, however, he remained so far true to his first scientific enmity that he could find nothing worse to say of the Roman judge and jurist than to term him "the Puchta of the ancient world." He finds in both

> the same fanaticism of juristic construction, which in its zeal overlooks the yawning gaps between the points of view adopted and the existing law; . . . the same blind adherence to legal logic, which infers outright that whatever does not suit it is impossible and whatever does is necessary; . . . the same intolerance of the views of others, and even of the rules laid down by the legislator, when they do not coincide with the concepts which these two jurists have arranged to their own satisfaction. Intellects, both of them, above the common stature; but violent, scientifically despotic natures, implacable doctrinaires.[2]

In their definitions and statements of principles, as in their whole theoretic construction of the law, Puchta and his followers abandoned to a large extent the method of independent induction from purely juristic data, and took their concepts ready-made from the professional philosophers, especially from Hegel. The philosophy of Hegel has influenced German jurisprudence in various ways. It helped to produce the "philosophical" reaction against the national theory of legal development.[3] It has also helped to give German legal theory an individualistic character. Hegel regarded law as a means for the attainment of true liberty; he described the evolution

[1] Born 1798, died 1846.

[2] Jhering, Besitzwille, pp. 283, 284.

[3] Gans, the champion of the universal or cosmopolitan point of view, was a disciple of Hegel and edited Hegel's Philosophy of History.

of law as "the development of the idea of freedom"; and he found the essence of individual freedom in the rational freedom of the individual will.

In pronouncing law to be more a system of liberty than a system of restraint, in emphasizing the element of freedom rather than the element of coercion, Hegel was perhaps influenced by the form in which the Roman law has come into the modern world. The only portion of that law which has survived and continued to influence European civilization is the portion which deals with private relations and in particular that which governs property relations. The constitutional, the administrative, and the criminal law of the Roman Empire are as dead as Julius Cæsar; the Roman private law is a living force. In every system of private law there is a wide range of individual autonomy — the state reaches its ends in private law through liberty as distinctly as in criminal law it reaches those ends through restraint — and in no system of private law is the field of individual freedom more generously measured than in the Roman. Add to this the fact that the Roman law — *i.e.*, the Roman private law — has been for centuries the general law of Europe, as compared with which all other law has seemed a mass of local and special rules, and the influence which the private-law point of view has exercised upon European thought in general, and which it may have exercised upon that of Hegel in particular, becomes sufficiently intelligible. These facts again explain the readiness with which the German jurists, especially those of the Romanistic school, have accepted Hegel's one-sided view of law.[1] Lawyers everywhere are apt to regard private law as *the* law, and the Romanist has a better excuse for this tendency than has the English lawyer.

Hegel's position that legal liberty is freedom of will rather than freedom of action or conduct has also some apparent basis in the Roman law. The Roman jurists laid much stress upon

[1] It may, of course, be urged that the prohibitions of the law, the restraints which it imposes, serve to protect individual liberty; but it is equally true that the attribution of rights to the individual operates to the restraint of others. In fact the two modes of regarding law are not antagonistic but complementary.

animus, voluntas, etc. There is, to be sure, nothing to show that the Roman jurists ever thought of will or intention as obtaining legal significance otherwise than through its revelation in word or deed; there is, in fact, evidence that the intention which a man's language or conduct would naturally suggest to others seemed to them much more important than his real intention; but their curt designation of the expressed will and the indicated intention as will and intention simply, and the importance which they ascribed to the individual will in determining legal relations, lend color to Hegel's assumption. The real explanation, however, of his theory that freedom is freedom of will is perhaps to be sought in the fact that he lived under a system of government which tolerated relatively little freedom of conduct.[1] His view of liberty seems as natural a product of governmental absolutism as Kant's theory of the "categorical imperative" in the field of ethics. But whatever its basis, Hegel's theory has had great success among German lawyers. Their definitions and statements of principles are almost uniformly dyed in the Hegelian color. Not only is a legal act — a contractual promise, for example, or a conveyance — "a declaration of will," but a right is regularly described as "a power of volition," the protection of possession is justified on the ground that the law respects "the realized will," — and so on indefinitely.

Against these tendencies in German jurisprudence — against the over-valuation of abstractions in particular — Jhering waged incessant war for the last thirty years of his life. It would have been difficult to find in all Germany a man better fitted to champion the cause of "practical jurisprudence." He came of that Frisian stock which is still most closely allied, in temper as in blood, to the English; he was by race instinct a realist.

[1] Perhaps, too, — since the position of a nation in the world at large affects the philosophy of its members, — the weakness of Germany in consequence of its disunity had something to do with Hegel's doctrine of liberty. Heine's remark that the Frenchmen ruled the land, the Englishmen the sea, and the Germans the realm of dreams, seems in point. And perhaps Heine's more famous saying that "the Englishman loves liberty like his lawful wife, the Frenchman like his mistress, and the German like his grandmother," may be construed as a satire upon the Hegelian conception of freedom.

He possessed, also, in high degree, the quality of mind that makes the lawyer — the power of brushing aside the accidents of a problem, and concentrating his attention upon its essence. He was a master of dialectics, quick to discern the weakest point in his adversary's logic. He had both wit and humor, and knew how to use them; he could make an untenable position manifestly absurd. Finally, no German of our day has commanded a more brilliant and persuasive style.[1] Its very defects — a certain diffuseness, a habit of saying the same thing several times before the exact formulation of the thought is attained — have their charm; to read him is to listen to the discursive talk of a full and ready speaker; the personal note, which so strongly influences a listener, vibrates from the printed page. These defects, moreover, — if they be defects, — were far outbalanced by positive excellences. He could make the most abstract theme concrete, the most technical question interesting, by his facility of suggestive illustration; and he had the power of making his ideas current by rounding them into sparkling epigrams. No legal writer of our day, not even Maine, has counted in his public so large a proportion of laymen. Nor was Jhering's public German only; French and Spanish translations of his *Spirit of the Roman Law*, and French versions of several other books and pamphlets gave him a cosmopolitan audience. To English readers, unfortunately, only his *Struggle for Law* is accessible, and the translation of this pamphlet leaves much to be desired.

Into his agitation against abstract jurisprudence,[2] Jhering, by his own account, brought the zeal of a convert. He has more than once described his change of heart; humorously in the anonymous *Confidential Letters*[3] with which he opened

[1] In recommending to us, his students, Jhering's first book on possession, Windscheid, who disagreed with the author's conclusions, warned us that we must read the book critically, "because everything of Jhering's is written with a brilliancy (*Glanz*) and a power of persuasion (*Ueberredungskraft*) that are almost irresistible."

[2] Other terms employed by Jhering are "speculative," "scholastic," "formalistic" jurisprudence, and *die Begriffsjurisprudenz*.

[3] Vertrauliche Briefe über die heutige Jurisprudenz, published 1860–66 in the *Preussische* (later *Deutsche*) *Gerichtszeitung*; reprinted in Scherz und Ernst (1885).

the conflict; seriously in the last part of his *Jest and Earnest*,[1] and in the preface to his *Possessory Intention*.[2]

There was a time [he writes] when I accepted Puchta as master and model of the correct juristic method, and when I was so captivated by that method that I was capable of going beyond my model. . . . That in the legislative embodiment [of legal theories] any other considerations were to be regarded except the desirability of *a priori* logical construction, I did not then dream; and I still remember how low an opinion I held of my friends among the practising lawyers who could not appreciate the coercive force of my ideas and deductions. . . . But then [about 1860] came the revulsion; not from within, but through external influences; through active intercourse with practitioners — an intercourse which I have always sought, cherished and turned to my advantage; through the occasions for practical activity on my own part which were afforded by appeals to the faculty[3] and requests to furnish opinions — occasions which not infrequently led me to recoil in terror from the application of theories that I had previously defended; and last, but not in least part, through the moot-court,[4] which I have held all my life, and which I regard as one of the most valuable correctives for the teacher himself against unsound theoretic views.[5]

A convert naturally exaggerates the sinfulness of his unregenerate years, and Jhering's self-accusation must be taken with more than a grain of salt. In the context of the passage just cited he instances, besides his earliest work,[6] published in 1844, sundry treatises which he had begun to write but had left unpublished and unfinished, and his opening essay in the first volume of the *Year-Books*,[7] — a periodical which he and the Germanist von Gerber started in 1857. In this essay, as in the

[1] Scherz und Ernst, pp. 338, 339.

[2] Besitzwille, pp. ix, x.

[3] The mediæval practice of referring cases to the law faculties continued through the middle of this century.

[4] "*Pandectenpracticum*" — an exercise in applying Roman law to concrete cases, real or hypothetical. "Moot-court" is in so far an inexact translation as the forms of judicial procedure are not usually observed in these *Practica*.

[5] Scherz und Ernst, *loc. cit.*

[6] Abhandlungen aus dem römischen Recht.

[7] *Jahrbücher für Dogmatik* — still published under the title *Jhering's Jahrbücher*.

third installment of his *Spirit of the Roman Law*,[1] which was written at nearly the same time, Jhering exalted the function of the "higher" or "productive" jurisprudence; but whether this was the same thing as the abstract jurisprudence which he began to combat three years afterwards, and whether, in his later work, he ever really abandoned the problems which he had set himself in 1857, may well be questioned. As to the unpublished treatises, we must take his word for their unpractical character; but the fact that they were not completed is an argument for Jhering as defendant, not for Jhering as *advocatus diaboli*. For the rest it may be said that his great work on the *Spirit of the Roman Law*, of which the major part was written between 1850 and 1860, does not impress a foreign reader as either abstract or unpractical; and the same may be said of his most important single contribution to "productive" jurisprudence, the theory of the negative interest of contract, which first saw the light in 1860[2] but was undoubtedly worked out at an earlier date. It may be added that his theory of possessory intention, set forth in his last important fulmination against "formalistic" jurisprudence in 1889, had taken preliminary form in his mind, and had been orally communicated to others, as early as 1846.[3]

There can be no question, however, that about 1860 Jhering became strongly convinced, as he afterwards expressed it, that

> a change must take place in our Romanistic theory. . . . It must abandon the delusion that it is a system of legal mathematics, without any higher aim than a correct reckoning with conceptions.[4]

He opened his attack, in the *Confidential Letters*, with a humorous sketch of the beauties of the new jurisprudence. He proceeded to show, in the case of a young theorist just plunged into practice, the unjust and absurd results to which the logical application of accepted general principles would lead. In the

[1] Geist des römischen Rechts, Theil 2, Abth. 2 (3d ed.), pp. 357-389.
[2] Jahrbücher, vol. iv, p. 16 *et seq.*
[3] Besitzwille, preface, p. vi.
[4] Scherz und Ernst, pp. 341, 342.

later letters he undertook to lay bare some of the causes of the aberrations of legal science. These he found partly in the divorce of practice and theory, partly in the system of legal instruction and examinations, but principally in the custom of requiring that every aspirant to a German professorship shall legitimate himself by producing something new in the way of theory. In Romanistic jurisprudence, he explains, this is practically impossible. The grapes have been trodden for centuries. The only way to get any more wine out of the dry mass is to pour on water before pressing again, and fortify the product with alcohol and sugar.

> The proportion in which these ingredients are added differs with the individual taste of the manufacturer. In most cases water preponderates. One jurist has experimented with alcohol alone; but without his observing it, a good deal of water is said to have run in with his *Spirit*.[1]

This allusion to his own work, with other bits of similar self-persiflage, was of course inserted to mislead those who were seeking to identify the author of the letters. The extent to which his purpose necessitated ridicule of particular writers made the preservation of the secret seem especially desirable. He continues:

> There have come into my hands, within a few days, various writings of one Dr. Asher, tutor in Heidelberg, — invaluable contributions, which, with sundry others, I shall use in one of my future letters. But I appeal to you: how can this man, in spite of the incredible ingenuity he displays, get away from the fact that Cujacius lived three centuries before him and took the best ideas off in advance? Had he been born then, and Cujacius in our time, he would very likely have been Cujacius, and Cujacius Dr. Asher. It all depends on the first chance at the press. It is all very well to say that if no new and sensible view is possible, it is better to take one already provided; but you do not understand the situation. Better a senseless view for one's self alone than a reasonable opinion in common with others.[2]

[1] Scherz und Ernst, p. 110.

[2] *Ibid.*, p. 111.

He concludes with a proposal that tutors be released from the necessity of publishing books. He finds in the Roman law a suggestion of a mode in which this reform might be brought about without ostensibly abandoning the rule. He finds there also a precedent for the lenient judgment of tutorial productions.

In Rome, as is well known, the rule existed from the time of Augustus that whoever desired to take by testament must show a certain number of children: *liberi* were the condition of *capacitas*. Persons, however, to whom the emperor was well disposed, escaped this trouble by obtaining the *ius liberorum;* the children were legally presumed or simply waived. Among others, Diana of Ephesus, who as goddess of chastity could not with propriety be held to the observance of the law, was thus invested with capacity. The importance attached in Rome to physical fruitfulness we attach to intellectual productivity: there it was "no inheritance without *liberi*"; here it is "no professorship without *libri*."[1]

He therefore proposes that, as soon as law tutors indicate an intention to print,

a *ius librorum* should be granted them, *i.e.*, they should be made professors just as if they had published the necessary books. Even now, in many universities, the requirement of books is not taken very strictly: there is the same leniency in judging them which the Romans observed in the matter of children, and which is set forth in the *Digest* in a way so humane and so applicable to the question before us, that I cannot refrain from printing the whole passage.

D. 50, 16, 135. "Quaeret aliquis, si portentosum vel monstrosum vel debilem mulier ediderit vel qualem visu vel vagitu novum, non humanae figurae, sed alterius, magis animalis quam hominis, partum, an, quia enixa est, prodesse ei debeat? Et magis est, ut haec quoque parentibus prosint: *nec enim est quod eis imputetur, quae qualiter potuerunt, statutis obtemperaverunt*, neque id quod fataliter accessit, matri damnum iniungere debet."

Freely adapted to the case in point: "When tutors have done the best they can to observe the statutes of the university, why should they be held responsible because, by ill hap, the books they have brought forth are not normal literary productions but monstrosities, or exhibit such debility of mind as not to seem viable? They have

[1] Scherz und Ernst, p. 113.

at least brought something into the world, and that should be reckoned to their credit." The granting of the *ius librorum* and the professorship should of course be made conditional on an undertaking not to publish the book submitted, or at least not to publish it for a term of years, say the classical nine years — *nonum prematur in annum.* The safest course would be to commit it to the custody of the law faculty. After the lapse of nine years and the attainment of the professorship, the author would hardly insist on publication. He would probably thank God that a wise paternal government had preserved him from an over-hasty literary venture.[1]

This is not only very good fooling : there is good sense back of it.

A more serious attack upon the current tendencies in German jurisprudence was made in the concluding sections of his fourth installment of the *Spirit of the Roman Law.* These contained a strong argument against "the over-valuation of the logical element in law,"[2] and an attempt to re-formulate the conception of a right.[3] "If a right is a power of willing," he inquired, "how is it that infants and lunatics have rights?" To this the orthodox responded that "the right does not exist through the fact that volition is exercised, that a will is expressed, but through the fact that an exercise of will is permitted, that a will may be expressed."[4] Jhering promptly seized this as an admission that, under the definition, it is the guardian and not the infant or lunatic who has the right, since it is the former whom the law "permits to will." Jhering's own definition of the right is "a legally protected interest." The interest is the "kernel"; the legal protection, by right of action, is the "shell." We speak of a right as appertaining to the infant or lunatic, and not to the guardian, because the interest is not with the latter, but with the former. So in the case of the fictitious or juristic person : the interests of an incorporated stock-company, for example, are those of the stockholders ; the conception of juristic personality in the

[1] Scherz und Ernst, pp. 113, 114.

[2] Geist des römischen Rechts, Theil 3, Abth. 1, pp. 308, 316.

[3] *Ibid.*, pp. 317–354.

[4] Windscheid, Pandekten, § 37, note 2.

corporation is simply a device for explaining its power to sue. The construction, according to this formula, of the "foundation," when property is held together for some religious, educational or charitable purpose, gave Jhering more trouble ; but with the courage of his convictions he here vested the interest — and therefore the right — in the public at large.

It is to be regretted that neither Jhering nor his adversaries were acquainted with the English law of trusts. They would there have found a full recognition of the element of interest, for which Jhering was contending, and they would also have found that English law, in distinguishing the legal from the equitable right, has always attributed the latter to the person who has the interest, and the former to the person who has the power. They might well have ended by admitting that these two elements exist in every right, and that the two are separable. Such a termination of the controversy would have left to the adherents of the dominant theory the right to insist that the really juristic element is the power, and to Jhering the credit of having called attention to that element which German theory had previously ignored.

Although no such consensus has been attained, Jhering's arguments have had considerable influence. Some jurists have accepted his definition ; others, like Bruns,[1] have attempted to weave into the sacred Hegelian formula a recognition of the interest which underlies the right.

MUNROE SMITH.

[*To be concluded in the following number.*]

[1] "Die subjektiven Rechte sind die Befugnisse, die den einzelnen Subjekten dem objectiven Rechte nach zustehen. Sie bestehen im Allgemeinen in der vom objectiven Rechte anerkannten und geschützten *Freiheit* der Einzelnen in Verfolgung ihrer Lebens*interessen*." Bruns, in Holtzendorff, 3d ed., p. 352. — "Freedom" is still there ; but "will" has disappeared, and "interest" has won a footing! Further on it appears that freedom has become freedom of action: "Möglichkeit zum *Handeln*."